In The

Supreme Court of the United States

October Term, 1997

CAROLYN C. CLEVELAND,

Petitioner,

vs.

POLICY MANAGEMENT SYSTEMS CORP; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; and CYBERTEK CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN E. WALL, JR.
Counsel of Record
LAW OFFICES OF JOHN E. WALL, JR.
Attorney for Petitioner
5728 Prospect Avenue, Suite 2001
Dallas, Texas 75206
(214) 887-0100

QUESTIONS PRESENTED FOR REVIEW

Carolyn Cleveland sued her former employers for violating the Americans with Disabilities Act ("ADA") when they terminated her for alleged poor performance after suffering a stroke and returning to work, despite her employers' admitted refusal to reasonably accommodate her resultant disability. Post-discharge of her employment, Cleveland was granted social security disability benefits retroactive to the date of her stroke which preceded her return to work without requested accommodation. The termination and the employer's tortious conduct directly worsened Cleveland's disability.

Nevertheless, and contrary to the decisions of most other Circuit Courts, the Fifth Circuit affirmed summary judgment, reasoning that Cleveland's social security disability application presumptively judicially estopped her from asserting she was a "qualified individual with a disability". The Fifth Circuit concluded its reasoning with the proposition that only under limited and highly unusual circumstances could a social security disability applicant/recipient rebut the presumption that such application and/or receipt would judicially estop such a person from maintaining that they were a "qualified individual with a disability." The questions presented for review are:

1. Doesn't the victim of an ADA violation have a right of action under the ADA for disability/wage loss damages caused by inability to work resulting from a tortious violation of the ADA?

2. Couldn't a covered employer, when equipped with the Fifth Circuit's opinion, patently and with impunity refuse to hire or fire a social security applicant/recipient solely because he/she is disabled, ignoring even the simplest of work place accommodations and without ever having to even articulate a

legitimate non-discriminatory business reason for the adverse employment action?

3. Realizing that Congress recognizes that Americans with disabilities continually encounter various forms of discrimination, doesn't the Fifth Circuit's reasoning that a social security claimant or recipient is presumptively estopped from asserting that he/she is a "qualified individual with a disability" pose yet another form of discrimination against those individuals who are disabled in the eyes of the law?

4. Doesn't the Fifth Circuit's opinion exhibit a judicially crafted means of excluding social security recipients from the protection of the ADA?

5. Doesn't the Fifth Circuit's opinion presumptively exclude a protected class (those regarded as being disabled) from protection of the ADA?

6. Doesn't the Fifth Circuit's opinion relegate social security recipients to perpetual ward status?

7. Did the United States Court of Appeals for the Fifth Circuit Court err in holding that: (1) "the application for or receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability' " for purposes of pursuing a claim under the Americans With Disabilities Act ("ADA"); and that (2) this presumption can only be overcome in "limited and highly unusual circumstances", a holding which is clearly contrary to decisions of the United States Courts of Appeals for the Sixth, Seventh, Eleventh and D.C. Circuits, as well as the Social Security Administration and the Equal Employment Opportunity Commission, each of which has determined that judicial estoppel

would rarely apply to such a case because a finding of "disability" by the Social Security Administration ("SSA") is *not* inconsistent with a finding that the same individual is a "qualified individual with a disability" because the ADA considers the issue of reasonable accommodation when determining "disability" and the SSA does not.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

Statutes Cited:

Contents

Other Authority Cited:

Contents

Page

APPENDIX

Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 120 F.3d 513 (5th Cir. 1997), affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondents. The Fifth Circuit's August 14, 1997 opinion is printed here as Appendix A. The district court's September 6, 1996 opinion is printed here as Appendix B. The Fifth Circuit's September 15, 1997 Order denying Petitioner's Petition for Rehearing is printed here as Appendix C.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit entered on August 14, 1997. Petitioner's timely filed petition for rehearing was denied by the Fifth Circuit Court of Appeals on September 15, 1997.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The statues applicable to this case are as follows:

Americans With Disabilities Act of 1990:

General Rule

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and or other terms conditions, and privileges of employment. 42 U.S.C. § 12112(a)

Disability

The term "disability" means, with respect to an individual —

> **(A)** a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> **(B)** a record of such an impairment; or
>
> **(C)** being regarded as having an impairment. 42 U.S.C. § 12102(2)

Qualified individual with a disability

> The term "qualified persons with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8)

Social Security Act:

Disability

> The term "disability" means — inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(1)(A); 42 U.S.C. § 1382c(a)(3)(A).
>
> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. 42 U.S.C. § 423(d)(2)(A); 42 U.S.C. § 1382c(a)(3)(B).

STATEMENT OF THE CASE

A. Basis for Federal District Court Jurisdiction

Petitioner, Carolyn C. Cleveland ("Cleveland") brought suit against her former employers, Respondents, Policy Management Systems Corp., General Information Services and Cybertek Corp., pursuant to the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* and Tex. Lab. Code Ann. § 451.001 (Vernon 1996)[1].

1. Cleveland's Tex. Lab. Code Ann. § 451.001 claim was dismissed without prejudice by the district court on the September 6, 1996 and is not at issue here.

Jurisdiction was proper in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1331.

B. Facts Material to Consideration of the Questions Presented

On January 7, 1994, during the course and scope of her employment with the Respondents, Carolyn Cleveland suffered a stroke.

Steven Herzog, M.D. provided medical treatment to Cleveland in connection with her stroke. As a result of the stroke, Cleveland suffered a condition known as aphasia. Aphasia is a disorder involving input and output of language, which affects reading ability, calculation ability, and the understanding and processing of all language functions. Aphasia also causes problems with memory.

After the stroke, Cleveland's ability to speak and to concentrate were impaired, and for a period of time, she could not speak at all. Cleveland was unable to read or dial a phone, and had trouble understanding most of what was said to her. Additionally, Cleveland's memory was impaired as a result of the stroke-induced aphasia.

After observing Cleveland's difficulty with communication, comprehension and memory, Cleveland's daughter, Sheri Short, became concerned about her mother. As a result, in January 1994, Short obtained an application for social security disability benefits.[2] Short filled in the application and had her mother sign it. Short then submitted the application to the Social Security Administration

2. Short had previously worked for the Tarrant County Adult Probation Department for approximately 14 years, and had observed that it often took a long time for government paperwork to be processed. Therefore, Short requested the social security application quickly in the event her mother would need benefits.

for her mother. Due to Cleveland's debilitated condition in January 1994, she does not recall her daughter filing this application, and although Cleveland signed the application form, she does not recall doing so.

After suffering the stroke, Cleveland worked hard to recover, and according to Dr. Herzog, she had made significant progress between January and April 1994. In fact, after undergoing speech rehabilitation, Cleveland was able to speak fairly well by April 1994.

In light of Cleveland's progress, Dr. Herzog released Cleveland to return to work in April 1994. At the time Cleveland was released to return to work, Dr. Herzog felt Cleveland's prognosis was positive for continued improvement and that she would eventually reach a near 100% recovery.

Cleveland returned to work for the Respondents in April 1994 on a part-time basis. Shortly after returning to work, Cleveland received some paperwork from the Social Security Administration. Upon receiving this paperwork, Cleveland contacted the Social Security Administration and informed them that she had returned to work and that she did not need social security disability benefits.

Cleveland worked part-time for about two weeks and then started working full time. Cleveland was fearful about returning to work, but her supervisors, Anthony Clark and Debra Levine, claimed they would assist Cleveland, or, if necessary, would provide her another job. This did not occur.

When Cleveland returned to work, she was not fully recovered from the stroke[3], and she experienced some difficulty with the increased workload she was assigned. As the Fifth Circuit noted in

3. Dr. Herzog noted that it sometimes takes 6-12 months to fully recover from a stroke.

their August 14, 1997 opinion, Cleveland requested several accommodations, including computer training, permission to take work home in the evenings, a transfer of position, and permission for the Texas Rehabilitation Commission to provide a counselor — free of charge — to assist Cleveland; however, the Respondents refused each of these requests.

In addition to the refusal to make reasonable accommodations for Cleveland, Cleveland's supervisor and her co-workers made cruel mocking remarks in reference to Cleveland's disabled condition. In Cleveland's presence, they laughed at her and belittled her by mimicking her stroke-induced speech impediment.

Less than two months after returning to work from her stroke, Cleveland received her first written warning. After this written warning, Cleveland doubled her efforts to produce quality work. In fact, a day or two before Cleveland's termination, Cleveland felt encouraged because she was finally getting some training from some of her co-workers, training which her supervisor repeatedly withheld.

In addition to finally receiving some training, Cleveland was experiencing fewer problems related to her stroke during the time prior to the termination. Cleveland could communicate more easily, her spelling had improved and the need to repeatedly recheck her work was decreasing.[4] Cleveland felt positive about her job performance. Indeed, prior to her termination, Dr. Herzog had anticipated that Cleveland would experience a near 100% recovery.

Regardless, on or about July 14, 1994, Peter Moore, Regional Vice President, and supervisor Debra Levine informed Cleveland

4. Dr. Herzog observed that Cleveland was experiencing few problems with aphasia, but still needed some additional time to recover fully.

that she was terminated because of poor job performance. Cleveland begged Moore to let her keep her job or move to another job. At this, Moore told Cleveland that his father had previously suffered a stroke and has not been able to do anything since. Moore declared that Cleveland would not be able to do anything either. During the initial termination meeting, Moore did agree to review Cleveland's work; however, the next day, Moore confirmed the termination.

As a result of Cleveland's termination in July 1994, she was devastated emotionally. Cleveland became depressed and her aphasia worsened as a result of the humiliating way she was treated and terminated by the Respondents. Cleveland deteriorated physically and began to feel worthless. Cleveland was fatigued, stressed and depressed after her termination.

For this reason, in September 1994, Cleveland renewed her prior application for social security disability benefits by filing a "Request for Reconsideration". In this request, Cleveland confirmed that: "I continue to be disabled". In connection with this request, Cleveland also filed a "Work Activity Report" wherein she explained that she had been terminated from her job with the Respondents because she could no longer do the job because of her condition — indeed, this was the Respondents' stated reason for termination.

In approximately December 1994, Cleveland began seeing a psychologist, Dr. Gant, for her depression and worsening condition. Dr. Gant determined that the loss of Cleveland's job and income were "emotionally devastating and have compounded her injury by affecting her self-confidence and self-esteem." Dr. Herzog noted in December 1994 that "[s]tress and anxiety have also exacerbated all of her [Cleveland's] symptoms."

In January 1995, Cleveland filed another "Request for Reconsideration" with the SSA and again confirmed that she was

unable to work due to her disability. In September 1995, Cleveland was granted social security disability benefits effective retroactively to January 7, 1994, the date of her stroke.

Approximately one week before receiving notice of the decision from the SSA, Cleveland filed suit against the Respondents for discriminating against her, failing to accommodate her disability and terminating her in violation of the Americans With Disabilities Act. The Respondents moved for summary judgment on the ADA claim for the sole reason that Cleveland was judicially estopped from claiming to be a "qualified individual with a disability" under the ADA by reason of her application for and receipt of social security disability benefits.

Included in the evidence presented in opposition to the summary judgment motion was an affidavit from Dr. Herzog, wherein he opined that Cleveland's depression resulted from her termination and that her depression over the termination caused her aphasia to worsen. Dr. Herzog further stated that, in his opinion, had Cleveland "been given training time and assistance on the job, instead of being terminated, she would have continued to recover from the stroke." Dr. Herzog also noted that "[w]ith time, understanding and therapy, Cleveland has slowly begun to recover from the post-termination relapse of her aphasia and depression."

Nevertheless, finding that Cleveland was judicially estopped from claiming to be a "qualified individual with a disability" because she previously declared herself "disabled" to the SSA, the district court granted summary judgment on Cleveland's ADA claim. In an opinion filed August 14, 1997, the Fifth Circuit Court of Appeals affirmed the summary judgment and held that Cleveland, "failed to raise a genuine issue of material fact which, if proved, would rebut the presumption that her sworn declarations of disability to the Social Security Administration (SSA) judicially estop her from asserting that under the ADA she is a 'qualified individual with a disability.' "

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT HAS ISSUED AN OPINION ON AN IMPORTANT FEDERAL ISSUE WHICH HAS YET TO BE ADDRESSED BY THE SUPREME COURT, AND IN SO DOING HAS CRAFTED A MEANS OF EXCLUDING THE DISABLED FROM THE PROTECTION OF THE AMERICANS WITH DISABILITIES ACT.

Enacting the Americans with Disabilities Act of 1990, Congress specifically found that:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in and contribute to society.

42 U.S.C. § 12101(a).

Congress stated that:

> [H]istorically, society has tended to isolate and segregate individuals with disabilities and that despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.

Id.

Congress further found that discrimination based on disability persists in critical areas such as employment, and recognized that unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion or age, disabled individuals have often had no legal recourse to redress such discrimination. *Id.* According to Congress:

> [T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.

Id.

Congress concluded that:

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and cost the United States billions of dollars in unnecessary expenses resulting from *dependency* and nonproductivity.

(Emphasis added). *Id.*

After making such findings, Congress set forth the purpose of the ADA; to wit: (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf

of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities. 42 U.S.C. § 12101(b).

Absent review by The Court of the effect of a declaration of disability to the SSA on an ADA claim, disabled individuals will be relegated to their pre-1990 status of being members of a society that may freely, without fear of legal recourse, discriminate against the disabled. The well-founded purpose for enacting the ADA is entirely usurped by the Fifth Circuit's holding that the application for or receipt of social security disability benefits creates a rebuttable presumption that the disabled individual is judicially estopped from asserting that he is a "qualified individual with a disability" for purposes of pursuing a discrimination in employment claim under the ADA. The ADA's goal to eliminate discrimination against disabled individuals is further defeated by the Fifth Circuit's determination that an individual such as Cleveland was judicially estopped from pursuing an ADA claim and that judicial estoppel would only be inapplicable in "limited and highly unusual circumstances".

The evidence in the present case established that had the Respondents not discriminated against Cleveland during her attempt to return to work, her condition would have continued to improve rather than deteriorate as it did after the termination. In other words, but for the Respondent's discriminatory conduct, Cleveland would not have been forced to renew her application for social security disability benefits. It was only after, and as a result of, the termination (which caused the worsening of her condition) that Cleveland actively pursued and received social security disability benefits.

Honoring the purpose and foundation of the ADA, employers such as the Respondents should not be absolved from violating the

ADA simply by reason of the fact that the employee at some point in time applied for or received social security disability benefits. Indeed, to allow the Fifth Circuit's ruling on this issue to stand, an employer would be able to hire an individual who is receiving social security disability benefits, and later freely discriminate against that individual. In other words, if the employer decided it no longer wished to comply with the law, the employer could blatantly discriminate against such an individual and that individual would have no legal recourse simply because she was receiving social security disability benefits. Additionally, an employer reluctant to hire the disabled could openly weed out disabled applicants by simply refusing to hire any individual who has applied for or receives social security disability benefits. Such an employer could, without fear of prosecution, place a sign in the window which read: "Social Security Disability Recipients Need Not Apply". On its face, such conduct would plainly violate the ADA; however, in light of rulings such as the Fifth Circuit ruling in the present case[5], a disabled individual subjected to such discrimination would have no recourse if they had previously applied for or received social security disability benefits. In light of the multitude of Americans receiving social security disability benefits today, the Fifth Circuit's determination that social security disability applicants are presumptively judicially estopped from asserting an ADA claim will allow the history of discrimination based on disability to persist

5. The United States District Courts of Appeals for the Third, Eighth and Ninth Circuits have also found that the doctrine of judicial estoppel bars an ADA claim when the employee has applied for or received social security disability benefits. *See McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997); *Dush v. Appleton Elec. Co.*, 124 F.3d 957 (8th Cir. 1997) and *Risetto v. Plumber and Steamfitters Local 343*, 94 F.3d 597, 606 (9th Cir. 1996). Notably, in a recent opinion, the Third Circuit acknowledged that *McNemar* had come under considerable criticism, some of which might be well-founded, and indicated that upon presentation of an applicable case, the issue may be revisited en banc. *Krouse v. American Sterilizer Company*, 126 F.3d 494, 502-03 (3rd Cir. 1997).

and permeate into the present and the future despite the enactment of the ADA — a statute specifically enacted to protect the disabled.

II.

THE FIFTH CIRCUIT'S HOLDING THAT: (1) "THE APPLICATION FOR OR RECEIPT OF SOCIAL SECURITY DISABILITY BENEFITS CREATES A *REBUTTABLE* PRESUMPTION THAT THE CLAIMANT OR RECIPIENT OF SUCH BENEFITS IS JUDICIALLY ESTOPPED FROM ASSERTING THAT HE IS A 'QUALIFIED INDIVIDUAL WITH A DISABILITY' " FOR PURPOSES OF PURSUING A CLAIM UNDER THE AMERICANS WITH DISABILITIES ACT ("ADA"); AND THAT (2) THIS PRESUMPTION CAN ONLY BE OVERCOME IN "LIMITED AND HIGHLY UNUSUAL CIRCUMSTANCES" IS CLEARLY CONTRARY TO DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH, SEVENTH, ELEVENTH AND D.C. CIRCUITS, AS WELL AS THE POSITIONS OF THE SOCIAL SECURITY ADMINISTRATION AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EACH OF WHICH HAS DETERMINED THAT JUDICIAL ESTOPPEL WOULD RARELY APPLY TO SUCH A CASE BECAUSE A FINDING OF "DISABILITY" BY THE SOCIAL SECURITY ADMINISTRATION ("SSA") IS *NOT* INCONSISTENT WITH A FINDING THAT THE SAME INDIVIDUAL IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" BECAUSE THE ADA CONSIDERS THE ISSUE OF REASONABLE ACCOMMODATION WHEN DETERMINING "DISABILITY" AND THE SSA DOES NOT.

In addition to deviating from the purpose of the ADA, the Fifth Circuit's holding is in direct contrast to decisions from the Sixth,

Seventh, Eleventh and D.C. Circuit Courts of Appeals, as well as the positions of the Social Security Administration and the Equal Employment Opportunity Commission.

Specifically, the United States Court of Appeals for the District of Columbia Circuit has issued two opinions wherein it held that receipt of social security disability benefits is *not* a bar to a disability discrimination claim. *See Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997); *Whitbeck v. Vital Signs, Inc.*, 116 F.3d 588 (D.C. Cir. 1997). The court in *Swanks* and *Whitbeck* rejected the argument that a social security disability claim precludes a disability discrimination claim because the two schemes employ "quite different standards and objectives". *Swanks*, 116 F.3d at 583-4; *Whitbeck*, 116 F.3d at 591. Rejecting a judicial estoppel theory, the D.C. Circuit in *Swanks* and *Whitbeck* recognized that in determining eligibility for social security disability benefits, the critical issue in an ADA case — *reasonable accommodation* — is *not* considered. *Swanks*, 116 F.3d at 583-87; *Whitbeck*, 116 F.3d at 591. The D.C. court noted that no where in the SSA's five step evaluation process for determination of eligibility for disability benefits is the issue of reasonable accommodation considered. *See Swanks*, 116 F.3d at 584-85. Moreover, in an Information Memorandum, the SSA states that "[t]he fact an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant. . . ." *See Swanks* at 585, *citing*, Daniel L. Skoler, ASSOC. COMM'R SOC. SEC. ADMIN., DISABILITIES ACT INFO. MEM. at 2, June 2, 1993 (No. SG3P2).

The *Swanks* and *Whitbeck* holdings are significant because they are based on guidance from the SSA and the Equal Employment Opportunity Commission. Specifically, prior to rendering the *Swanks* and *Whitbeck* opinions, the court sought and considered amici curiae briefs from the SSA and the EEOC. *Swanks* at 584; *Whitbeck* at 590. Considering the standards and procedures

of the SSA and the EEOC, the D.C. Circuit determined that a social security disability claim does not bar a disability discrimination claim.[6] *Swanks* at 583-87; *Whitbeck* at 591.

As in *Swanks*, the Equal Employment Opportunity Commission filed an amicus curie brief in support of Clevelands' petition for rehearing in this case. *See* Appendix D. In addition to pointing out the conflict of the decision with recent circuit case law, in the amicus curie brief, the EEOC pointed out that the Fifth Circuit's decision in *Cleveland* was "flatly inconsistent with the position of the Social Security Administration." (Appendix D, p. 19a). The EEOC quoted the position of the SSA, as was set forth in the amicus curiae brief by the SSA in *Swanks*, as follows: "[a]n application for, and award of, social security disability benefits does not constitute an admission as a matter of law that the individual is physically unable to work", and thus, does not, under any circumstance, "bar as a matter of law his claim under the ADA." *(See* Appendix D, p. 19a). As noted by the EEOC, applying the SSA's legal standards for determining eligibility for disability benefits, it is clear that judicial estoppel has no place in the context of an ADA claim because in the SSA context, there is no specific inquiry into "the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." (Appendix D, p. 24a). Confirming this point, the SSA specifically stated in a June 2, 1993 memorandum, which specifically addressed the ADA's "potential effect on the evaluation

---

6. In *Swanks*, the court also stated that in reaching this conclusion, it did not mean that statements in support of a social security disability claim were never relevant in an ADA case. *Swanks*, at 587. As example, keeping with the position that SSA determinations do not consider whether a claimant could work with reasonable accommodations, the *Swanks* court noted that statements to the SSA that a claimant could not perform the essential functions of their job even with accommodation could bar that claimant from asserting in an ADA claim that an accommodation would have allowed them to perform that same job. *Swanks*, at 587.

of disability under the [SSA]", that "[t]he fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant to the [eligibility determination]." (Appendix D, p. 24a). As noted by the EEOC, in this memorandum, the SSA concluded that eligibility standards under the ADA and SSA have "no direct application to one another"; therefore, a finding of "total disability" under the SSA is not "synonymous" with a finding of an inability to work either with or without reasonable accommodations for purposes of the ADA. (Appendix D, p. 24a). As was reaffirmed by the SSA in its amicus curiae brief in *Swanks*, there is nothing "inherently inconsistent" between a claim for social security disability benefits and a claim of being an otherwise qualified individual with a disability under the ADA. (Appendix D, p. 25a). Also, as acknowledged by the EEOC and SSA, there are many individuals who would qualify as disabled because of having one of the SSA's listed impairments and that:

> [M]any persons with listed impairments, for example, amputations, in fact are able to work quite successfully, even though SSA would find them "disabled" if they decided not to work and instead sought benefits.

(Appendix D, p. 26a).

The EEOC also opined in its amicus curiae brief that although properly rejecting any absolute rule that a claim for social security disability benefits bars suit under the ADA, the Fifth Circuit had:

> [E]mbraced a standard that would leave aggrieved individuals without recourse under the ADA in most cases in which an individual has applied for or received social security disability benefits.

(Appendix D, p. 23a).

Indeed, the Fifth Circuit's claim that it would be the "highly unusual" case wherein a social security disability recipient would not be barred from an ADA claim is directly contrary to the EEOC's and the SSA's position that an ADA claim which is properly barred by some inconsistent statement in the SSA application would be the rarity.

In conformity with the position of the EEOC and the SSA, and in the wake of *Swanks*, the Sixth Circuit Court of Appeals, on rehearing, issued a Supplemental Opinion on August 22, 1997 wherein it stated that it agreed with the holding in *Swanks* that receipt of social security disability benefits does not preclude an ADA claim, that judicial estoppel is rejected and that prior sworn statements are only considered as a material factor in analyzing the case. *Blanton v. Inco Alloys International, Inc.*, 123 F.3d 916, 917 (6th Cir. 1997).

In addition to *Swanks*, *Whitbeck* and *Blanton*, the Seventh Circuit recently confirmed its position that an individual's claim for social security disability benefits does not bar a claim under the ADA. *See Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997).[7] The *Weigel* court held that the granting of social security disability benefits "is not determinative as to whether or not she [the employee] may be considered a 'qualified individual' under the ADA." *Weigel*, 122 F.3d at 466. The Seventh Circuit held that statements of "disability" to the SSA are "not irrelevant to the question of whether an ADA plaintiff is a 'qualified individual with a disability' " and that, in the absence of evidence that the individual could have performed her prior job with reasonable accommodation,

---

7. *See also Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992) wherein the Seventh Circuit held that the issue of whether the plaintiff was entitled to social security disability benefits might be relevant to the severity of the handicap, but that such a determination could not be construed as a judgment that such a plaintiff was not qualified to do his job under the Rehabilitation Act.

such statements along with other evidence could support summary judgment. *Id.* at 466-68. The *Weigel* court, however, also held that declarations of being " 'wholly unable to work,' or some other variant to the same effect" is not conclusive on the issue of whether that same individual is a "qualified individual with a disability" under the ADA. *Id.* At 466-67. As such, the court found that the apparent incongruity between an ADA claim and an SSA claim is "entirely illusory because the terms, 'totally disabled' and 'qualified individual with a disability' are terms of art that must be understood within their respective statutory contexts." *Id.* at 466.

In *Talavera v. School Board of Palm Beach County*, __ F.3d __ (11th Cir. 1997) (1997 WL 728368 (11th Cir. Nov. 24, 1997)), the Eleventh Circuit Court of Appeals joined the ranks of the majority of circuit courts and held that "a certification of total disability on an SSD [social security disability] application is not inherently inconsistent with being a 'qualified individual with a disability' under the ADA." *Talavera* at *7. The *Talavera* opinion is significant because it illustrates the fact that the Fifth Circuit's "rebuttable presumption" position in *Cleveland* is a deviation from the opinions of the majority of circuit courts on this issue. Specifically, when analyzing the case law on the interplay between a claim for social security disability benefits and a claim of being a "qualified individual with a disability", the Eleventh Circuit noted that the Fifth Circuit's opinion in *Cleveland* exuded an "obvious skepticism" and displayed a reluctance to find that individuals who are "totally disabled" for social security disability purposes are covered by the ADA. *Talavera* at *7. Rejecting the "skeptical" position of the Fifth Circuit, the Eleventh Circuit followed the reasoning behind *Swanks, Blanton,* and *Weigel* and held that:

> A certification of total disability on a SSD application does mean that the applicant cannot perform the essential functions her job without reasonable accommodation. It does not necessarily

> mean that the applicant cannot perform the essential functions of her job with reasonable accommodation.

Talavera at *7.

In contrast to the position of the EEOC, the SSA, and the Sixth, Seventh, Eleventh and D.C. Circuit Courts of Appeals, when analyzing the facts in *Cleveland* and determining that her statements were "entirely inconsistent", the Fifth Circuit failed to consider the fact that inquiries in a social security disability claim do not encompass the accommodation issue. (Appendix A, pp. 12a-13a). Specifically, as noted by the Fifth Circuit in *Cleveland,* the statements in question were as follows: (1) in an initial application filed with the assistance of her daughter, Cleveland stated that she was "unable to work because of her disabling condition on January 7, 1994" and was "still disabled"; (2) a September 1994 (post termination) "Request for Reconsideration" which stated "I continue to be disabled"; (3) a "Work Activity Report" which stated she was terminated "because I could no longer do the job because of my condition"; (4) a January 1995 second "Request for Reconsideration" and May 1995 request for hearing wherein she stated she was "unable to work due to my disability". (Appendix A, p. 3a). Contrary to the Fifth Circuit's finding that these statements were inconsistent with her claim she was a "qualified individual with a disability", such statements do not bar Cleveland's ADA claim as a matter of law because they do not speak to the issue of reasonable accommodation. *See Swanks* at 583-87.

In light of the SSA's complete lack of consideration of reasonable accommodations in an SSA determination of "disability", there is nothing inconsistent about Cleveland's statements to the SSA. Because the question of reasonable accommodation was not raised in the SSA proceeding, Cleveland's statements in her SSA claim that she was "disabled" or "unable to work" or "unable to do [her] job" were not inconsistent with her

claim in her ADA case that she would have been able to do her job had she been provided reasonable accommodation. Based on facts similar to the present case wherein the employee had no accommodation in his or her past work, the *Swanks* court held that an SSA "determination that the claimant cannot do past work says *nothing* about the claimant's ability to perform his or her former job." (emphasis added) *Swanks* at 585. As in *Swanks*, *Whitbeck*, *Weigel* and *Blanton*, Cleveland's statements regarding her disability are not inconsistent and do not bar her ADA claim.

Nevertheless, the Fifth Circuit ignored the absence of the consideration of reasonable accommodations by the SSA and ruled that Cleveland's ADA claim was barred by judicial estoppel. Far from being a fact specific ruling, under the Fifth Circuit's opinion in *Cleveland*, similar statements of an inability to work, which are no doubt made by most all other social security disability applicants, would act to bar most every ADA claim brought by social security disability applicants or recipients.

CONCLUSION

The Fifth Circuit's presumption of judicial estoppel cannot be reconciled with the holding of the majority of the circuit courts that the application for or receipt of social security disability benefits is *not inconsistent* with being a "qualified individual with a disability"; therefore, absent review by The Court an inherent inconsistency will inequitably fester in the application of a federal law designed to in part to provide "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *See* 42 U.S.C. § 12101(b)(3).

Absent review by the Court, of the Fifth Circuit's decision on this sharply conflicting legal issue, disabled individuals will be left to suffer the indignities of discrimination without recourse and without the protection of the law specifically designed to protect the disabled.

Respectfully submitted,

JOHN E. WALL, JR.
Counsel of Record
LAW OFFICES OF
JOHN E. WALL, JR.
Attorney for Petitioner
5728 Prospect Avenue
Suite 2001
Dallas, Texas 75206
(214) 887-0100

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 14, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11247

CAROLYN C. CLEVELAND,

Plaintiff-Appellant,

versus

POLICY MANAGEMENT SYSTEMS CORPORATION; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; CYBERTEK CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before WIENER and PARKER, Circuit Judges, and LITTLE,* District Judge.

WIENER, Circuit Judge:

Plaintiff-Appellant Carolyn C. Cleveland appeals the district court's grant of summary judgment for her former employer, Defendant-Appellee Policy Management Systems Corporation

---

* Chief District Judge of the Western District of Louisiana, sitting by designation.

(PMSC), on her claim of wrongful termination under the Americans with Disabilities Act (ADA).[1] We affirm, concluding that Cleveland has failed to raise a genuine issue of material fact which, if proved, would rebut the presumption that her sworn declarations of disability submitted to the Social Security Administration (SSA) judicially estop her from asserting that under the ADA she is a "qualified individual with a disability."

I.

FACTS AND PROCEEDINGS

PMSC hired Cleveland in August 1993. The following January, Cleveland suffered a stroke while on the job and took a leave of absence. She was unable to return to work immediately, however, as the stroke caused aphasia, a condition that affects concentration, memory, and language functions such as speaking, reading, and spelling.

With her daughter's assistance, Cleveland filed an application for social security disability benefits. In support of her sworn application, Cleveland certified that she had become "unable to work because of [her] disabling condition on January 7, 1994" and that she was "still disabled." She acknowledged also that it is a crime to make a false statement in an application for social security disability benefits.

In April 1994, Cleveland's doctor released her to return to work and anticipated an eventual recovery for her of nearly 100%. Cleveland alleges that when she returned to work at PMSC she contacted the SSA and informed them that she had

1. 42 U.S.C. §12101 *et seq.* (1994).

returned and that she no longer needed disability benefits. PMSC concedes that she informed the SSA of her return but denies that she ever withdrew her application for disability benefits or otherwise indicated that she was anything other than totally disabled.

Following her return, Cleveland did not perform well at PMSC. She requested several accommodations, including computer training, permission to take work home in the evenings, a transfer of position, and permission for the Texas Rehabilitation Commission to provide a counselor — free of charge — to assist her. PMSC denied each of her requests. In July 1994, PMSC terminated Cleveland for poor job performance.

Cleveland claims that as a consequence of her firing she became depressed and that her aphasia worsened. In September 1994, she renewed her application for social security disability benefits by filing a "Request for Reconsideration" in which she stated, "I continue to be disabled," and a "Work Activity Report" in which she stated that she was terminated "because I could no longer do the job because of my condition." In January 1995, Cleveland filed another "Request for Reconsideration" and that May requested a hearing before an Administrative Law Judge (ALJ), in both instances representing that she was "unable to work due to my disability."

In September 1995, the ALJ concluded that Cleveland had become disabled on January 7, 1994 and was disabled continuously through the date of the ALJ's decision. Consequently, the ALJ granted her social security disability benefits, effective retroactively to January 7, 1994.

One week before the ALJ's decision, Cleveland had filed

suit against PMSC for wrongful termination in violation of the ADA and the Texas Labor Code. PMSC moved for partial summary judgment, asserting that Cleveland could not establish a prima facie case under the ADA, as her representations in her application for, and her receipt of, social security disability benefits estopped her from claiming that she is a "qualified individual with a disability." The district court granted PMSC's motion on the ADA claim and dismissed the state law claim without prejudice.

Cleveland timely appealed, insisting that she is not estopped from establishing as a matter of law that she is a "qualified individual with a disability." Specifically, she maintains that her position in pursuit of social security disability benefits and her instant position under the ADA are not inconsistent, as (1) she was disabled for purposes of social security disability benefits when she filed the initial application; (2) when she returned to work, she notified the SSA and withdrew her claim for benefits; and (3) she became disabled *again* for purposes of social security disability benefits only after and as a result of her termination. Cleveland contends that, from the time she returned to work until she was terminated, she could have performed the essential functions of her job with a reasonable accommodation, i.e., during that period she was a "qualified individual with a disability."

II.

ANALYSIS

A. Standard of Review

We review the district court's grant of summary judgment

de novo, applying the same standards as the district court.[2] Summary judgment is proper when the evidence, viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.[3]

B. Applicable Law

The ADA prohibits an employer from discriminating against "a qualified individual with a disability because of the disability."[4] To assert an ADA violation successfully, in the absence of direct evidence of discrimination, a plaintiff must first make a prima facie showing that, inter alia, he is a "qualified individual with a disability."[5] A "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual.[6] A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions" of his job.[7]

---

2. *Melton v. Teachers Ins. & Annuity Assn. of America*, 1997 WL 285720, at *1 (5th Cir. June 16, 1997).

3. *River Production Co., Inc. v. Baker Hughes Production Tools, Inc.*, 98 F.3d 857, 859 (5th Cir. 1996) (citing Fed. R. Civ. P. 56(c)).

4. 42 U.S.C. §12112(a) (1994).

5. *See Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995).

6. 42 U.S.C. §12102(2)(A) (1994).

7. 42 U.S.C. §12111(8) (1994).

Appendix A

The Social Security Act prescribes an individual's eligibility for social security disability benefits. An individual is entitled to receive such benefits if he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment"[8] and only if that impairment is of such severity that he is unable to do his previous work and cannot engage in any other kind of substantial gainful work which exists in the national economy.[9]

When the two statutes are read in pari materia, it seems logically inconsistent, at first blush, for an individual to claim that he qualifies for social security disability benefits while simultaneously maintaining that he can perform the essential functions of his position for purposes of asserting an ADA claim. Herein lies the dilemma.

Several of our fellow circuits have held that a plaintiff who represents that he is totally disabled for purposes of recovering social security disability benefits cannot then assert that he is a "qualified individual with a disability" for purposes of bringing an ADA claim. Those circuits have barred the subsequent ADA claim under various theories of preclusion, including the equitable doctrine of judicial estoppel.[10]

---

8. 42 U.S.C. §423(d)(1)(A) (Supp. 1997). The impairment must be expected to result in death or to last for a continuous period of not less than twelve months.

9. 42 U.S.C. §423(d)(2)(A) (Supp. 1997).

10. The Third, Sixth, Seventh, and Ninth Circuits have invoked the doctrine of judicial estoppel. *See McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3d Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 958 (1997) (plaintiff estopped from arguing that he is qualified under the

(Cont'd)

Appendix A

(Cont'd)

ADA); *Blanton v. Inco Alloys Int'l, Inc.*, 108 F.3d 104, 108-09 (6th Cir. 1997) (plaintiff's previous representations to the SSA estop him from claiming that he can perform the essential functions of his position, *but* error for the district court to apply judicial estoppel to plaintiff's claim that he could have performed other jobs); *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995) (plaintiff estopped from arguing that he was anything other than actually disabled); and *Risetto v. Plumber and Steamfitters Local 343*, 94 F.3d 597, 606 (9th Cir. 1996) (plaintiff estopped from claiming that she was performing her job adequately when she had previously obtained a favorable settlement based on her assertion that she could not work). The First and Eighth Circuits have treated a plaintiff's prior representations to the SSA as binding admissions. *See August v. Offices Unlimited, Inc.*, 981 F.2d 576, 584 (1st Cir. 1992) (plaintiff conceded that he was totally disabled at all relevant times and cannot now establish that he was a "qualified handicapped person" and thus cannot make the prima facie case required to prevail under the Massachusetts discrimination statute) and *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768, 771 (8th Cir. 1987), *cert. denied*, 485 U.S. 938, 108 S. Ct. 1116 (1988) (plaintiff admitted that she cannot perform the essential functions of the job in question and that she will be unable to do so in the near future; therefore, she does not qualify for protection under the federal Rehabilitation Act). The Ninth Circuit has precluded a plaintiff's subsequent ADA claim based on an insufficiency of evidence to overcome plaintiff's prior sworn statements to the SSA. *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481-82 & n.3 (9th Cir. 1996) (unnecessary to apply judicial estoppel when there was no genuine issue of material fact that plaintiff was totally disabled; only evidence to the contrary was plaintiff's self-serving and uncorroborated affidavit in support of her ADA claim). In addition, a number of district courts have disallowed the subsequent ADA claim. *See e.g. Hatfield v. Quantum Chemical Corp.*, 920 F. Supp. 108, 110 (S.D. Tex. 1996) (logically inconsistent for plaintiff to say that he is so impaired that he cannot care for himself while simultaneously arguing that he can go to work and perform his job); *Harris v. Marathon Oil Co.*, 948 F. Supp. 27, 29 (W.D. Tex. 1996), *aff'd*, 108 F.3d 332 (5th Cir. 1997) (impossible for plaintiff to have been totally disabled under social security law and able to perform

(Cont'd)

Appendix A

Judicial estopped prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.[11] The doctrine serves a clear purpose: to protect the integrity of the judicial process.[12]

We decline, however, to adopt a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA.[13] It is at least theoretically

(Cont'd)
the essential functions of his position under the ADA); *Johnson v. Hines Nurseries, Inc.*, 950 F. Supp. 175, 178 (N.D. Tex. 1996) (plaintiff should be judicially estopped from claiming that he is a qualified individual with a disability after representing himself as totally disabled to the SSA, *but* noting that plaintiff's representations of total disability are at a minimum factors to consider in determining if a fact question exists as to whether plaintiff could have performed his job); *Johnson v. City of Port Arthur*, 892 F. Supp. 835, 842 n.1 (E.D. Tex. 1995) (plaintiff's pursuit of social security disability benefits is a position at odds with his ADA claim); and *Reigel v. Kaiser Foundation Health Plan of North Carolina*, 859 F. Supp. 963, 970 (E.D.N.C. 1994) (plaintiff "cannot speak out of both sides of her mouth with equal vigor and credibility").

11. *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996).

12. *United States v. C.I.T. Constr. Inc. of Texas*, 944 F.2d 253, 258 (5th Cir. 1991).

13. *See D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 4-5 (1st Cir. 1996) (plaintiff's application for disability benefits may not have constituted a broad admission of incapacity; genuine issue of material fact existed as to whether plaintiff could have continued to work with a reasonable accommodation); *Blanton*, 108 F.3d at 109-10 (plaintiff's previous representations to the SSA did not estop him from claiming that

(Cont'd)

Appendix A

conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive, as the SSA's determination of an applicant's entitlement to social security disability benefits would not be synonymous with a determination that a plaintiff is or is not a "qualified individual with a disability" under the ADA.[14]

(Cont'd)
he could have performed other jobs); *Shirley v. Westgate Fabrics, Inc.*, 1997 WL 135605, at *3 (N.D. Tex. Mar. 17, 1997) ("There is no rigid rule that receipt of disability benefits precludes recovery on an ADA claim. Courts that have considered the issue have concluded that the receipt of disability benefits is a factor to be considered by the court."); *Morton v. GTE North Inc.*, 922 F. Supp. 1169, 1182 (N.D. Tex. 1996), *aff'd*, 114 F.3d 1182 (5th Cir. 1997) (strict estoppel approach has no support in the case law); *Hughes v. Reinsurance Group of America*, 957 F. Supp. 1097, 1100 (E.D. Mo. 1996) (evidence demonstrates that plaintiff was representing that she could not perform her particular job, not that she was totally disabled); and *Smith v. Dovenmuehle Mortgage, Inc.*, 859 F. Supp. 1138, 1142 (N.D. Ill. 1994) ("Defendant's position would place plaintiff in the untenable position of choosing between his right to seek disability benefits and his right to seek redress for an alleged violation of the ADA.").

14. *Robinson v. Neodata Services, Inc.*, 94 F.3d 499, 502 n.2 (8th Cir. 1996) (SSA determination of eligibility for benefits is not synonymous with determination whether plaintiff is a qualified individual for purposes of the ADA; at best, social security determination is evidence for trial court to consider in making its own independent determination); *Weiler v. Household Finance Corp.*, 101 F.3d 519, 523-24 (7th Cir. 1996) ("Because the ADA's determination of disability and a determination under the Social Security disability system diverge significantly in their respective legal standards and statutory intent, determinations made by the Social Security Administration concerning disability are not dispositive findings for claims arising under the ADA."); and *Pegues v. Emerson Electric Co.*, 913 F. Supp. 976, 980 (N.D. Miss. 1996) (a finding of disability by the SSA does not necessarily foreclose an ADA claim).

First, while the ADA requires an individualized inquiry into the ability of a particular person to meet the requirements of a particular position, the SSA permits general presumptions about an individual's ability to work. The SSA considers some conditions to be presumptively disabling. If a claimant has an impairment that is medically equivalent to a listed impairment, the SSA presumes that the disorder is so severe as to prevent the claimant from doing any substantial gainful activity, without considering his age, education or past work experience.[15] Thus, an individual can have a "disability" under the SSA definition and still be able to work.

Second, the SSA does not consider whether the individual can work with reasonable accommodation. An SSA interpretative guidance addressing the SSA's disability determination process states,

> The fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant to the issues to be resolved. . . . [H]ypothetical inquiries about whether an employer would or could make accommodations that would allow return to a prior job would not be appropriate.[16]

Thus, a person may be unable to do any work which exists in the national economy even though he can work with a reasonable accommodation. In those instances, the person is both a person

15. 20 C.F.R. §404.1520(d) (1997).

16. *See* "Americans with Disabilities Act of 1990 — INFORMATION," Memorandum from the Associate Commissioner, Social Security Administration 1 (June 2, 1993).

with a "disability" under the SSA and a "qualified individual with a disability" under the ADA. Accordingly, a person claiming to be disabled under the SSA may still be entitled to protection under the ADA.

Third, even the SSA recognizes that an individual may be able to qualify as SSA "disabled" and still be able to work in a particular position. For example, the SSA has a trial work period that allows beneficiaries to work for nine months while their benefit entitlement and payment levels remain unchanged.[17] Similarly, the SSA provides individuals who return to work with benefits in any month in which earnings fall below a statutory level.[18]

We hold therefore that the application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a "qualified individual with a disability." We thus leave open the possibility that there might be instances in which the nature and content of the disability statement submitted to the SSA, in the context of the particular facts of the case, would not absolutely bar a plaintiff from attempting to demonstrate that despite his total disability for Social Security purposes he is a "qualified individual with a disability." Conceivably, such a plaintiff might be able to rebut this presumption if he were able to present credible, admissible evidence — such as his social security disability benefits application, other sworn documentation, and his allegations relevant to his ADA claim — sufficient to show that, even though he may be disabled for purposes of social

17. 20 C.F.R. §404.1592(a) (1997).

18. *Id.*

security, he is otherwise qualified to perform the essential functions of his job with a reasonable accommodation and thus not estopped from asserting an ADA claim.

C. Is Cleveland Estopped From Asserting Her ADA Claim?

We conclude that, on the facts before us — particularly her sworn statements to the SSA that she was disabled — Cleveland has not raised a genuine issue of material fact to rebut the presumption that, while she remains disabled for purposes of Social Security, she is estopped from asserting that she is a "qualified individual with a disability." Cleveland continuously and unequivocally represented to the SSA that she is totally disabled and completely unable to work. As her statements are unambiguous and previously uncontroverted, she cannot now be heard to complain that she could perform the essential functions of her job during the time between her return to work and her termination. To permit Cleveland to make such an argument in the face of her prior, consistent, and — until now — uncontested sworn representations to the SSA would be tantamount to condoning her advancement of entirely inconsistent positions, a factual impossibility and a legal contradiction.[19]

---

19. *Pegues*, 913 F. Supp. at 980-81 (ADA claim not necessarily foreclosed, but when plaintiff previously represented in administrative proceedings that she was unable to work, she cannot now argue that she could have performed the essential functions of her job with a reasonable accommodation); *Morton*, 922 F. Supp. at 1182-83 (under these facts, plaintiff has no standing to assert ADA claim, as she has continuously represented that her disability prevented her from performing her job); and *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 555 (D. Kan. 1995) (on this record, plaintiff is estopped from asserting ADA claim; having collected substantial benefits and based on these unambiguous and seemingly informed representations, plaintiff cannot now claim that she could perform the essential functions of her job).

III.

CONCLUSION

As Cleveland consistently represented to the SSA that she was totally disabled, she has failed to raise a genuine issue of material fact rebutting the presumption that she is judicially estopped from now asserting that for the time in question she was nevertheless a "qualified individual with a disability" for purposes of her ADA claim. For the foregoing reasons, the district court's grant of summary judgment for PMSC is AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION FILED SEPTEMBER 6, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. 3-95-CV-2140-AJ

CAROLYN C. CLEVELAND

VS.

POLICY MANAGEMENT SYSTEMS CORP., GENERAL INFORMATION SERVICES, a division of POLICY MANAGEMENT SYSTEMS CORP., and CYBERTEK CORPORATION

JUDGMENT

This action came on for consideration of defendants' motion for partial summary judgment, the undersigned Magistrate Judge presiding by the express consent of all parties, and the Court having determined that plaintiff is estopped as a matter of law from claiming to be a qualified individual under the Americans with Disabilities Act.

It is ORDERED and ADJUDGED that the motion for partial summary judgment on plaintiff's claim under the Americans with Disabilities Act be, and it is, hereby granted, that this action be, and it is, dismissed on the merits, and that defendants have and recover of plaintiff their costs of action.

Appendix B

It is further ORDERED and ADJUDGED that plaintiff's claim for relief for alleged violations of Tex.Lab.Code Ann. §451.001 be, and it is, hereby dismissed without prejudice.

Signed this 6*TH* day of September, 1996.

s/ illegible
UNITED STATES MAGISTRATE
JUDGE

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 15, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11247

CAROLYN C CLEVELAND

Plaintiff - Appellant

v.

POLICY MANAGEMENT SYSTEMS CORP; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; CYBERTEK CORP

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before WIENER and PARKER, Circuit Judges, and LITTLE,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is *denied.*

---

* Chief District Judge of the Western District of Louisiana, sitting by designation.

Appendix C

ENTERED FOR THE COURT:

s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX D — BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT'S PETITION FOR REHEARING FILED SEPTEMBER 5, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11247

CAROLYN C. CLEVELAND,

Plaintiff-Appellant,

v.

POLICY MANAGEMENT SYSTEMS CORPORATION and GENERAL INFORMATION SERVICES,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT'S PETITION FOR REHEARING

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("Commission") is the agency charged with the enforcement of Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA"). In an opinion dated August 14, 1997, a panel of this Court affirmed a grant of summary judgment in favor of the defendants, relying heavily on the fact that the

plaintiff had certified that she was totally disabled in support of her claim for disability benefits under the Social Security Act. In dismissing the plaintiff's claim, the panel declined to adopt "a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA." *Cleveland v. Policy Management Systems Corp.*, No. 96-11247, 1997 WL 464657, *3 (5th Cir. Aug. 14, 1997). The panel ruled, however, "that the application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.' " *Id.* at *4. The panel implied that an individual would be able to overcome this presumption only "under some limited and highly unusual set of circumstances." *Id.* at *3.

The panel's decision should be revised or withdrawn for at least three reasons. First, the panel's ruling that an individual is presumptively estopped from asserting an ADA claim, when the individual has applied for or received social security disability benefits, is flatly inconsistent with the position of the Social Security Administration ("SSA"), as recently articulated in a brief filed in the D.C. Circuit Court of Appeals. In that brief (included as an addendum to this brief), the SSA stated that "[a]n application for, and award of, social security disability benefits does not constitute an admission as a matter of law that the individual is physically unable to work" and, thus, does not, under any circumstance, "bar as a matter of law his claim under the ADA." Brief of the SSA at 8, *Swanks v. WMATA*, 116 F.3d 582 (D.C. Cir. 1997) ("*Swanks* Brief"). The panel's ruling is also inconsistent with the decisions of a majority of circuit courts, which have rejected the application of judicial estoppel in this statutory context. Most notably, the panel's ruling is

inconsistent with the recent decisions of the D.C. Circuit (*Swanks v. WMATA*, 116 F.3d 582 (D.C. Cir. 1997); *Whitbeck v. Vital Signs, Inc.*, 116 F.3d 588 (D.C. Cir. 1997)); the Sixth Circuit (*Blanton v. Inco Alloys Int'l, Inc.*, 108 F.3d 104 (6th Cir. 1997), *supplemental opinion*, 1997 WL 525292 (6th Cir. Aug. 22, 1997)); and the Seventh Circuit (*Weigel v. Target Stores*, No. 96-3719, 1997 WL 526163 (7th Cir. Aug. 26, 1997)). Finally, as a general matter, the panel's application of judicial estoppel in this case conflicts with the prior decisions of this Court, which have been highly critical of the estoppel doctrine. *See, e.g., Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 2559 (1996); *United States v. McCaskey*, 9 F.3d 368 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1565 (1994). The panel decision, if left in place, will expand judicial estoppel beyond the narrow limits established in this Circuit.

As the agency charged to administer Title I of the ADA, the Commission has a strong interest in arguing against the adoption of legal doctrines that will unfairly deprive ADA claimants of their day in court. Because of the importance of the issues raised by this appeal to the effective enforcement of the ADA, the Commission offers its views to the court.

STATEMENT OF THE CASE

This case involves a claim of disability discrimination under the ADA. The plaintiff, Carolyn Cleveland, alleges that her former employer, Policy Management Systems Corporation ("PMSC"), terminated her employment because of her disability.

Cleveland began working for PMSC in August 1993. *Cleveland*, 1997 WL 464657 at *1. Cleveland suffered a stroke in January 1994 and took a leave of absence from work. *Id.*

Cleveland filed an application for social security disability benefits, certifying that she was " 'unable to work because of [her] disabling condition on January 7, 1994' and that she was 'still disabled.' " *Id.*

In April 1994, Cleveland's physician released her to return to work. *Id.* Cleveland resumed her job with PMSC, notifying the SSA of the change in her condition. *Id.* Cleveland encountered difficulties in performing her job, on her return to work, and asked for several accommodations that would assist her in performing the essential functions of the job. *Id.* PMSC denied all of Cleveland's requested accommodations and, in July 1994, terminated her employment, allegedly for poor performance. *Id.*

In September 1994, Cleveland renewed her application for social security disability benefits. *Id.* Cleveland represented that she " 'continue[d] to be disabled' " and that she had been terminated from her job because she " 'could no longer do the job because of [her] condition.' " *Id.* Cleveland stressed that her condition had worsened "as a consequence of her firing." *Id.* Cleveland filed a Request for Reconsideration, in January 1995, reaffirming her assertion that she was " 'unable to work' " within the meaning of the legal standards applied by the SSA. *Id.* The matter was referred to an ALJ, who awarded Cleveland disability benefits, effective retroactively to January 7, 1994. *Id.* at **1-2.

Cleveland subsequently brought suit under the ADA. PMSC moved for summary judgment, arguing that "Cleveland could not establish a prima facie case under the ADA, as her representations in her application for, and her receipt of, social security disability benefits estopped her from claiming that she

is a 'qualified individual with a disability.' " *Id.* at *2. The district court granted summary judgment on that basis. *Id.*

On appeal, a panel of this Court affirmed the district court's grant of summary judgment. The panel first rejected "a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA." *Id.* at *3. The panel explained that, because of the different legal standards involved, claims under the Social Security Act and the ADA "would not necessarily be mutually exclusive." *Id.* Having rejected any per se estoppel rule, the panel, nonetheless, adopted a standard that would allow for the application of estoppel in most cases in which an individual applies for or receives social security disability benefits. Specifically, the panel ruled that "the application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.' " *Id.* at *4. The panel opined that an individual would be able to overcome this presumption only "under some limited and highly unusual set of circumstances." *Id.* at *3. Based on this standard, the panel ruled that Cleveland had not "raised a genuine issue of material fact to rebut the presumption that, while she remains disabled for purposes of Social Security, she is estopped from asserting that she is a 'qualified individual with a disability.' " *Id.* at *4.

ARGUMENT

This case raises important issues concerning the application of the doctrine of judicial estoppel to bar otherwise viable claims of disability discrimination under the ADA. The panel, while correctly (in our view) rejecting any absolute rule that a claim

for disability benefits under the Social Security Act bars suit under the ADA, embraced a standard that would leave aggrieved individuals without recourse under the ADA in most cases in which the individual has applied for or received social security disability benefits. For the following reasons, we urge this court to revise or withdraw the panel opinion and to hold, in accordance with the growing consensus on this issue, that the doctrine of judicial estoppel has no place in this statutory context.

I. THE PANEL'S RULING THAT AN APPLICATION FOR, OR RECEIPT OF, DISABILITY BENEFITS PRESUMPTIVELY ESTOPS AN INDIVIDUAL FROM ESTABLISHING THE QUALIFICATIONS ELEMENT OF HIS OR HER ADA CLAIM IS INCONSISTENT WITH THE POSITION OF THE SSA.

The principal ground for revising or withdrawing the panel decision is that the decision is inconsistent with the position of the SSA itself. In its opinion, the panel cited to SSA regulations and other statements by the SSA concerning the relationship between the Social Security Act and the ADA. *See Id.* at **3-4. The panel, however, did not have before it the full views of the SSA. The SSA has now made clear that, in light of the legal standards applied by the SSA in determining eligibility for disability benefits, there is no basis for applying judicial estoppel in this context.

The disability benefit programs of the Social Security Act are designed to provide a stream of income to individuals who, because of a disability, are unable to obtain jobs in "significant numbers" in the "national economy." 42 U.S.C. § 1382c(a)(3)(B). The Social Security Act contemplates a

"generalized" inquiry into the individual's "ability to find work in the national economy." *Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992). In sharp contrast to the ADA, there is no individualized inquiry into "the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(2) (1996) (ADA regulation).

Because of the different legal standards involved, the SSA has made clear that an individual's receipt of disability benefits under the Social Security Act does not preclude a finding that the individual is a "qualified individual" within the meaning of the ADA. In a memorandum dated June 2, 1993, the SSA specifically addressed the ADA's "potential effect on the evaluation of disability under the [SSA]." *Americans with Disabilities Act of 1990 — INFORMATION*, Memorandum from the Associate Commissioner, SSA at 1. The SSA stated that, under the standards of the Social Security Act, "[t]he fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant to the [eligibility determination]." *Id.* at 2. The SSA stressed that, in contrast to the ADA's particularized approach to the qualifications issue, eligibility for disability benefits "is based on the functional demands and duties of jobs as ordinarily required by employers throughout the national economy," and not on "[w]hether or how an employer might be willing (or required) to alter job duties to suit the limitations of a specific individual." *Id.* at 3. The SSA concluded that, because the eligibility standards under the ADA and the Social Security Act have "no direct application to one another," a finding of "total disability" under the Social Security Act is not "synonymous" with a finding of an inability to work for purposes of the ADA. *Id.* at 1, 3.

The SSA further clarified its views on the relationship between the disability standards under the Social Security Act and the ADA in an *amicus* brief filed on February 28, 1997, in the case of *Swanks v. WMATA*, 116 F.3d 582. In that brief, the SSA stated that "[a]n application for, and an award of, social security disability benefits does not constitute an admission as a matter of law that the individual is physically unable to work, and thus it does not bar as a matter of law his claim under the ADA." *Swanks* Brief at 8. Noting that the "inquiries under the Social Security Act are . . . significantly different from the inquiries under the ADA," the SSA asserted that statements made to obtain disability benefits are "not a per se bar to an ADA claim" and "may have only limited relevance to the ADA case." *Id.* at 2, 8-9. The SSA emphasized that, in assessing eligibility for social security disability benefits, the SSA "does not consider whether the former employer, or other employers, might make a reasonable accommodation that would allow the claimant to work," *id.* at 6, 9, meaning that an individual could be "totally disabled" or "unable to work" within the meaning of the Social Security Act and still be a "qualified individual" for purposes of the ADA. According to the SSA, there is nothing "inherently inconsistent" between a plaintiff's claim for disability benefits under the Social Security Act and his claim of qualifications under the ADA. *Id.* at 8.

As the SSA has explained, there are a number of grounds for reconciling a claim for disability benefits under the Social Security Act with a claim of qualifications under the ADA. First, because the SSA does not take into account the issue of reasonable accommodation, an individual's claim that she is "totally disabled" or "unable to work," within the meaning of the legal standards applied by the SSA, is in no way inconsistent with an assertion that she could have performed the essential

functions of her prior job with accommodation. Since accommodation is a commonplace feature of most ADA cases, this difference in standards will provide a basis for reconciling the two claims in a high percentage of cases. In addition, the SSA has stated that it does not concern itself with an individual's ability to work in those cases in which benefits are awarded at step three of the SSA's sequential evaluation process, due to a listed impairment. According to the SSA, "[m]any persons with listed impairments, for example, amputations, in fact are able to work quite successfully, even though SSA would find them disabled if they decided not to work and instead sought benefits." *Swanks* Brief at 11. Finally, the SSA has explained that, as a general matter, a finding of a "total disability" does not constitute a finding, as a matter of law, that an individual is physically unable to work." *Id.* at 8. The SSA awards disability benefits to individuals who face real-world barriers to employment, even though such individuals, with job training or assistance, might be able to obtain work. *See id.* at 11; *see also* 55 SOC. SEC. BULL. 36 (Spring 1992) (stating that "[e]nabling beneficiaries with disabilities to achieve a better and more independent lifestyle by helping them take advantage of employment opportunities is one of SSA' s highest priorities").

The panel decision cannot be squared with these principles. The panel ruled that an individual who has applied for or received disability benefits is presumptively estopped from establishing that she is a "qualified individual with a disability" under the ADA. The panel implied that such a presumption was proper because only in "some limited and highly unusual set of circumstances" would the two claims "not necessarily be mutually exclusive." 1997 WL 464657 at *3. This is simply wrong. As the SSA has made clear, there is a substantial overlap between the categories of individuals protected under these two

statutory schemes. It is not the rare case in which claims under these two statutes can be reconciled. Indeed, in most ADA cases, the mere application or receipt of disability benefits will be of little relevance to the qualifications issue, given the SSA's assertion that it does not examine the issue of reasonable accommodation in determining eligibility for disability benefits. Because an individual's prior claim for disability benefits can be readily reconciled with her ADA claim, there is no basis for adopting a rebuttable presumption in favor of judicial estoppel.

Of course, there may be cases in which an individual, not only asserts that she is "totally disabled" under the standards applied by the SSA, but makes specific factual representations (*e.g.*, that she could not perform her prior job even with reasonable accommodation) that are inconsistent with her claim of qualifications under the ADA. In these cases, however, there is no need to resort to judicial estoppel. An individual who has previously sworn to facts that are specifically inconsistent with positions taken in her ADA case will have difficulty mounting a viable ADA claim. In fact, under normal summary judgment standards, an individual is bound by her prior sworn statements in the sense that such statements are given " 'controlling weight' at summary judgment unless 'the shifting party can offer persuasive reasons for believing the supposed correction.' " *See Swanks,* 116 F.3d at 587 (quoting *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991)). Courts can dispose of cases in which an ADA claimant has truly taken inconsistent positions without invoking estoppel principles.

In this case, Cleveland asserted that she was "unable to work" within the meaning of the legal standards applied by the SSA. That assertion, by itself, is not inconsistent with her claim of qualifications under the ADA. While Cleveland also stated

that she " 'could no longer do the job because of [her] condition,' " 1997 WL 464657 at *1, that statement, placed in context, is not inconsistent with her claim that she could have performed the job *if PMSC had not denied her the accommodations that she sought.* In fact, Cleveland claims that her condition worsened as a result of her termination, meaning that she might have been able to perform her prior job, with an accommodation, at the time of her termination, even if she had reached the point, some months later, that she could no longer work.[1] Cleveland's assertions before the SSA are not inconsistent with her claim of qualifications under the ADA and do not, in any event, support the application of estoppel as a bar to suit.

II. THE PANEL'S ADOPTION OF A REBUTTABLE PRESUMPTION IN FAVOR OF JUDICIAL ESTOPPEL IS INCONSISTENT WITH THE DECISIONS OF A MAJORITY OF CIRCUIT COURTS.

A second ground for revising or withdrawing the panel decision is that the decision conflicts with the growing consensus, among the circuit courts, that the doctrine of judicial estoppel has no place in this statutory context. In its decision, the panel suggested that most circuit courts had invoked judicial estoppel to bar ADA claims. In fact, the case law, at the circuit court level, is stacked firmly against the panel's approach.

First, the D.C. Circuit has issued two decisions that reject

1. That assertion is not inconsistent with the fact that the SSA awarded benefits retroactively to January 1994, since, as noted above, the SSA does not ask whether an individual could have performed her prior job with accommodation. The SSA's award represents a finding that Cleveland was totally disabled, as of that date, within the meaning of the legal standards applied by the SSA, not that she was unable to work, at that point, even with reasonable accommodation.

the application of judicial estoppel in this context. In *Swanks v. WMATA*, the court rejected the view that an individual's statement to the SSA that she is "disabled and unable to work" bars her ADA claim. 116 F.3d at 587. Stressing that, "in assessing eligibility for disability benefits, the [SSA] gives no consideration to a claimant's ability to work with reasonable accommodation," the court ruled that "[a]wards of disability benefits . . . cannot bar ADA relief." *Id.* at 584, 586. The court held that, because the plaintiff had presented sufficient evidence to support a finding that he could have performed his prior job with reasonable accommodation, summary judgment was improperly granted to the employer. *Id.* at 587-88; *see also Whitbeck v. Vital Signs, Inc.*, 116 F.3d at 591-93 (relying on *Swanks* in holding that the plaintiff's statements to the SSA did not bar suit under the ADA; plaintiff presented sufficient evidence to survive summary judgment on accommodation claim).[2]

Relying on *Swanks*, the Sixth Circuit recently rejected the view that an individual's certification of a total disability, before the SSA, could support the application of judicial estoppel. *See Blanton v. Inco Alloys Int'l, Inc.*, 108 F.3d 104. In *Blanton*, the court initially ruled that a claim for disability benefits did not provide an absolute bar to suit, although it implied that judicial estoppel might apply, in this context, in some circumstances. *See* 108 F.3d at 108-10. The Commission filed a brief in support of the plaintiff's petition for rehearing, placing before the court the brief of the SSA in *Swanks* (and the *Swanks* decision itself). In response, the Sixth Circuit issued a supplemental opinion, clarifying that its prior opinion "should not be read to endorse judicial estoppel in this context." 1997 WL 525292 at *1. The

2. *Swanks* and *Whitbeck* were both decided on June 20, 1997, some two months before the panel decision. Neither case is mentioned in the panel opinion.

court stated that it agreed with D.C. Circuit's opinion in *Swanks*, "that holds that the receipt of disability benefits does not preclude subsequent ADA relief and rejects the doctrine of judicial estoppel, but does allow the consideration of prior sworn statements by the parties as a material factor." *Id.*

Finally, the Seventh Circuit has recently ruled that an individual's claim for disability benefits under the Social Security Act does not, under any circumstance, bar a claim under the ADA. *See Weigel v. Target Stores*, 1997 WL 526163 (7th Cir. Aug. 26, 1997). Noting that the apparent incongruity between the two claims is "entirely illusory because the terms 'totally disabled' and 'qualified individual with a disability' are terms of art that must be understood within their respective statutory contexts," the court ruled that an individual's statement to the SSA that she is " 'wholly unable to work,' or some other variant to the same effect," is not "conclusive as to the ADA issue [of qualifications]." *Id.* at **4-6. The court recognized, as does the Commission, that such statements are "not irrelevant to the question of whether an ADA plaintiff is a 'qualified individual with a disability' " and that, in the absence of competent evidence to the contrary, an individual's specific factual assertions before the SSA might, together with other evidence in the case, support the grant of summary judgment in favor of the employer. *Id.* at **5-6. The court ruled that, because the plaintiff failed to present competent evidence that she could have performed her prior job with reasonable accommodation, the plaintiff could not survive summary judgment. *Id.* at **6-7.

The panel indicated that the First Circuit has treated an individual's prior representations to the SSA as "binding admissions." *See* 1997 WL 464657 at *3 n.10 (citing *August v. Offices Unlimited Inc.*, 981 F.2d 576, 584 (1st Cir. 1992)). In fact, the First Circuit has since limited *August* to its narrow facts,

ruling that, in most cases of reasonable accommodation, there will be no basis for applying estoppel or treating the individual's statements to the SSA as preclusive. *See D'Aprile v. Fleet Servs. Corp.*, 92 F.3d 1, 4-5 (1st Cir. 1996). The panel also stated that the Sixth and Seventh Circuits have invoked judicial estoppel to bar ADA claims. *See* 1997 WL 464657 at *3 n.10. As noted above, both of these courts have now rejected the doctrine in this statutory context. While the panel suggested that the Eighth Circuit has applied a form of fact-based estoppel, based on statements to the SSA, that court, in a recent case, stated that the issue "remains open in our Circuit." *Dush v. Appleton Elec. Co.*, No. 96-3289, 1997 WL 530542, *4 n.8 (8th Cir. Aug. 28, 1997). Finally, the panel drew support from the Ninth Circuit's decision in *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996). In *Rissetto*, the court applied judicial estoppel but in a case involving a claim of age (not disability) discrimination, where the plaintiff had certified to a total inability to work in a workers' compensation proceeding (not before the SSA). The court simply assumed that, in that particular context, the two claims were inconsistent. In this statutory context, where the issue of reasonable accommodation, in particular, differentiates the issue of coverage under the two statutes, the Ninth Circuit has ruled that an individual's claim of "total disability" under the SSA, while relevant to the issue of qualifications, is not conclusive.[3] *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1479-82 & n.3 (9th Cir. 1996) (declining to apply the doctrine of judicial estoppel).

Contrary to the panel's suggestion, the circuit court

3. We also note that the Tenth Circuit has, in general, rejected the doctrine of judicial estoppel. *See, e.g., In re Osborn*, 24 F.3d 1199, 1207 n.11 (10th Cir. 1994); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 n.10 (10th Cir. 1991); *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986); *Parkinson v. California Co.*, 233 F.2d 432, 437-38 (10th Cir. 1956).

precedent strongly militates against the application of judicial estoppel, in any form, in this statutory context. In fact, the only circuit court decision to have embraced the doctrine in this context, *McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997), was issued before the views of the SSA were clearly understood and, thus, stands as questionable precedent. *See Swanks*, 116 F.3d at 587 (criticizing *McNemar*). This Court should hold, in accordance with the growing consensus on the estoppel issue, that judicial estoppel does not apply in this statutory context.

III. THE PANEL'S EXPANSIVE APPLICATION OF JUDICIAL ESTOPPEL IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

A final ground for revising or withdrawing the panel decision is that the decision expands the doctrine of judicial estoppel beyond the narrow limits set by this Court. This Court has never been a champion of judicial estoppel. This Court has described judicial estoppel as an " 'obscure doctrine,' " *United States v. McCaskey*, 9 F.3d at 378, "lacking 'defined principles' and subject to criticism as 'basically an ad hoc decision in each case.' " *Nichols v. Scott*, 69 F.3d at 1272. This Court has applied the doctrine sparingly to prevent individuals from " 'playing fast and loose' with the courts," *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996), but only when the statements at issue are "significantly inconsistent." *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268-69 (5th Cir. 1988).

This Court, in fact, has strongly suggested that the doctrine of judicial estoppel, as its name implies, applies only in the context of *judicial* proceedings. This court has stated that judicial estoppel is designed " 'to protect the integrity of the judicial process.' " *Grant v. Lone Star Co.*, 21 F.3d 649, 651 n.2 (5th

Cir.), *cert. denied*, 115 S. Ct. 574 (1994). Specifically, the doctrine "minimizes the danger of a party contradicting a court's determination based on the party's prior position," thereby resulting in "inconsistent court determinations." *United States ex. rel. Am. Bank v. C.I.T. Constr. Inc.*, 944 F.2d 253, 258-59 (5th Cir. 1991). The doctrine is applied when an individual has taken inconsistent positions before two courts, thereby posing a "threat to judicial integrity" by creating the probability that " 'one court has . . . been misled.' " *Id.* at 258 (quoting *USLIFE Corp. v. U.S. Life Ins. Co.*, 560 F. Supp. 1302, 1305 (N.D. Tex. 1983)); *see also Dockery v. North Shore Medical Ctr.*, 909 F. Supp. 1550, 1558 (S.D. Fla. 1995) (relying, in part, on Fifth Circuit precedent in holding that judicial estoppel "should not be applied to oaths undertaken in administrative filings" since "undertaking such an oath in an administrative filing and then later attempting to take a different position in a court of law, does not threaten the integrity of the judicial system").

Given these standards, this case is wholly unsuitable for the application of judicial estoppel. As noted above, in the vast majority of cases, there will be no inconsistency between an individual's claim for social security disability benefits and his claim of qualifications under the ADA. Even assuming, however, that such inconsistency exists, judicial estoppel should not be extended to administrative filings. If an individual has lied under oath before the SSA, the SSA has the tools at its disposal to pursue a case of perjury against the malfeasant. *See Dockery*, 909 F. Supp. at 1559 n.16. If the individual is misrepresenting the facts in his ADA case, the normal tools of the adversarial process, (*e.g.*, discovery, cross-examination, and impeachment) can ferret out the truth. In light of the important public policies at stake (*e.g.*, the widespread dismissal of otherwise viable claims of disability discrimination), this Court should not choose this statutory context to expand the doctrine of judicial estoppel beyond its narrow limits.

Appendix D

CONCLUSION

The panel correctly rejected any "per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA." 1997 WL 464657 at *3. The panel erred, however, in adopting a rebuttable presumption in favor of estoppel, a standard that would effectively result in the application of judicial estoppel as an absolute bar to suit in most ADA cases in which the plaintiff has applied for or received social security disability benefits. This Court should revise or withdraw its opinion on the estoppel issue.

Respectfully Submitted,
C. GREGORY STEWART
General Counsel
J. RAY TERRY, JR.
Deputy General Counsel
GWENDOLYN YOUNG REAMS
Associate General Counsel
LORRAINE C. DAVIS
Assistant General Counsel

s/ Robert J. Gregory
ROBERT J. GREGORY
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY
COMMISSION
1801 L Street, N.W.
Washington, D.C. 20507
(202) 663-4059

Appendix D

CERTIFICATE OF SERVICE

I, Robert J. Gregory, hereby certify that on this 5th day of September, 1997, two copies of the attached brief were sent by overnight mail, postage prepaid, to each of the following counsel of record:

John Edward Hall, Jr.
5728 Prospect Avenue
Suite 2001
Dallas, Texas 75206

David Norman Kitner
Strasburger & Price, L.L.P.
901 Main Street
Suite 4300
Dallas, Texas 75202

s/ Robert J. Gregory
Robert J. Gregory

Appendix D

ADDENDUM

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7078

MICHAEL SWANKS,

Plaintiff-Appellant,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The United States files this brief as *amicus curiae* on behalf of the Social Security Administration (SSA), in response to this Court's *sua sponte* order of January 27, 1997, inviting SSA to file an *amicus* brief in this appeal within 30 days. The order provided that the brief "may address but need not be limited to" two specific questions, namely:

> (1) whether [SSA] accounts for the possibility of reasonable accommodation under the Americans with Disabilities Act ("ADA") by the prior employer,

Appendix D

> or by employers in the available labor market, when making a disability determination, and (2) what adjustments (if any) [SSA] would make to a person's disability status or benefits as a result of an ADA-related reinstatement or damage award.

Although the Court asked only these two fairly narrow questions, we think it would be useful, as the Court also suggested, that our brief "not be limited to" those questions, but rather that it also address the underlying question of the overall nature of the relationship between a prior award of social security (or supplemental security income) disability benefits and a claim against a former employer under the ADA. On that underlying question, the courts have reached a variety of inconsistent conclusions, ranging from the idea that any social security claim absolutely bars any ADA claim, see *McNemar* v. *The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3rd Cir. 1996), to the idea that the two schemes are so different that the social security claim would have little effect on the ADA claim, see *Overton* v. *Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992); *Smith* v. *Dovenmuenle Mortgage, Inc.*, 859 F.Supp. 1138, 1141-42 (N.D. Ill. 1994). Our view is that a claim for social security disability benefits has several significant differences from a claim under the ADA, and therefore a prior social security benefit claim and award is not a per se bar to an ADA claim. In some cases, however, specific statements made by the claimant or findings made by SSA in connection with a disability claim might be relevant to the issue before the court in the ADA case concerning the plaintiff's ability to perform the essential functions of his prior job.

Appendix D

STATUTES AND REGULATIONS

The pertinent statutes and regulations (including internal SSA materials) are reproduced in the addendum.

STATEMENT

1. ***Social Security Disability Determination.*** Two programs operated by SSA determine whether an individual is entitled to benefits on the basis of the same definition of disability. Both Title II, which provides benefits, and calculates their level, based on the individual's prior work record, see 42 U.S.C. 423, and Title XVI (also known as Supplemental Security Income, or SSI), which provides benefits for the indigent, see 42 U.S.C. 1382, define disability for adults as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months * * *." 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A). Under both programs,

> [a]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

Appendix D

SSA has adopted these requirements into a five-step sequential evaluation process that it applies to each claim made by an adult. See *Bowen* v. *Yuckert*, 482 U.S. 137, 140-142 (1987). At step one, SSA determines if the claimant engaged in "substantial gainful activity;" if so, the claim is denied. 20 C.F.R. 404.1520(b), 416.920(b). At step two, SSA determines whether the claimant has a severe impairment, that is, a medical impairment that significantly limits his ability to do basic work activities; if not, the claim is denied; if so, he proceeds to the next step. 20 C.F.R. 404.1520(c), 404.1521, 416.920(c), 416.921. At step three, SSA determines whether the claimant has an impairment that meets or equals any of the impairments described on a list located at 20 C.F.R. Part 404, Subpart P. App. 1. These are impairments of a nature and of a level of severity that SSA will presume that anyone who meets or equals one or more of the listings is unable to work and thus will be awarded benefits. 20 C.F.R. 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, 416.926.

If the claimant does not meet or equal a listing, he proceeds to step four, where SSA determines whether he can still perform his "past relevant work," that is, "the physical and mental demands of the kind of work you have done in the past;" if he can do so, SSA will deny benefits. 20 C.F.R. 404.1520(e), 404.1560(b), 416.920(e), 416.960(b). If he cannot do his past relevant work, SSA proceeds to step five, where it will determine whether the impairment prevents the claimant from performing any other type of work which exists in significant numbers in the regional or national economy, taking into account the vocational factors of age, education, and prior work experience. 20 C.F.R. 404.1520(f), 404.1560(c), 416.920(f), 416.960(c).

2. ***Facts.*** One year after plaintiff was discharged from his

job as a special police officer for the Washington Metropolitan Area Transit Authority (WMATA), he applied for social security disability benefits (Title II). His claim was denied at the ini al and reconsideration stages, but an administrative law judge, after a hearing, awarded the benefits (App. 18a-18d). The ALJ concluded that his impairment, a congenital abnormality of the spine which creates urinary incontinence, does not meet or equal any listed impairment. The ALJ concluded that it does, however, leave him unable to perform his past relevant work or any other work which exists in significant numbers in the regional or national economy, principaliy because it prevents him from engaging in frequent contact with other persons (*ibid.*). The ALJ thus awarded benefits retroactive to the month in which he left his job at WMATA, October 1992.

While his social security claim was pending, plaintiff also sued WMATA under the Americans with Disabilities Act, claiming that WMATA failed to make a reasonable accommodation for his disability; according to his brief to this Court, plaintiff requested 10 minute exercise periods each hour, which would enable him to maintain better control of his bladder. WMATA moved for summary judgment, arguing that plaintiff's receipt of social security disability benefits constitutes an admission that he is physically unable to work, and thus it bars as a matter of law his claim under the ADA that he is able to continue in his job, despite his medical impairments, with or without a reasonable accommodation. The district court agreed and granted summary judgment to WMATA (App. 97-103). It held that plaintiff failed to make a prima facie case that he is a "qualified individual with a disability" and thus eligible to make a claim under the ADA, see 42 U.S.C. 12112(a), because his claim for social security disability benefits is a binding admission that he cannot perform the essential functions of his job, either

with or without a reasonable accommodation (Order at 5-6, App. 101-102).

SUMMARY OF ARGUMENT

1. A successful claim for social security benefits is not an absolute bar to the ADA claim. The significant differences between those types of claims mean that the social security claim may have only limited relevance to the ADA case.

a. A strong basis to distinguish social security from ADA is that SSA does not consider whether the former employer, or other employers, might make a reasonable accommodation that would allow the claimant to work. SSA does not wish to speculate about what employers might do but did not in fact do to provide reasonable accommodations.

b. Another substantive difference between the claims is that SSA may award benefits at step three, based only on the showing that the claimant has a listed impairment, without considering his residual functional capacity or his ability to do past relevant work, or at step 5, where vocational factors (age, education and work experience) could be the deciding factors. Moreover, the ADA court should remember that under Title II, a Beneficiary can return to work for a 9-month trial period and still continue to receive his disability benefits.

2. A claimant's representations to SSA when showing at step four that he is unable to perform his actual past relevant work, however, can be relevant to the ADA claim, which can raise a similar factual issue. But the ADA court must look carefully at the social security record, since there can be specific factual differences in the two cases.

3. A reinstatement order, if the ADA plaintiff then returns to work, would trigger the 9-month trial period for Title II beneficiaries. Otherwise, a return to work would be substantial gainful activity and thus require that SSA terminate benefits. Back pay would not require a repayment of past benefits, since the award does not represent actual work performed.

ARGUMENT

AN APPLICATION FOR AND AWARD OF SOCIAL SECURITY DISABILITY BENEFITS IS NOT A PER SE BAR TO A CLAIM UNDER THE AMERICANS WITH DISABILITIES ACT, BUT IT MAY BE RELEVANT EVIDENCE IN THE ADA CASE

Claims for social security disability benefits and claims under the ADA have a number of significant differences. Yet they do share at least one common premise: both can require a finding as to whether the claimant is able to perform the essential functions of his former job. Thus, the record in the social security proceeding can be relevant to the ADA claim. On the other hand, there can be major distinctions between what is at issue in the social security proceeding and what is at issue in the ADA proceeding that make it possible to reconcile the two claims. The court deciding a later ADA claim thus must be sensitive to the similarities and differences. It should not, as the district court did here, simply find that the claimants positions are inherently inconsistent and thus reject his ADA claim on its face. An application for, and an award of, social security disability benefits does not constitute an admission as a matter of law that the individual is physically unable to work, and thus it does not bar as a matter of law his claim under the ADA.

1. At least one circuit has held that the mere fact that an individual has applied for social security benefits and has sworn that he is disabled, and that SSA accepted that application, is so entirely inconsistent with a later ADA claim that it absolutely bars the ADA claim under a theory of judicial estoppel. See *McNemar v. The Disney Store. Inc.*, 91 F.3d 610, 617-18 (3rd Cir. 1996) (applying strict judicial estoppel in social security/ ADA context). As a general matter, this circuit does not accept judicial estoppel. See *UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469, 477 (D.C. Cir.), *cert. denied*, 113 S.Ct. 3039 (1993), citing *Konstantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980) (rejecting judicial estoppel doctrine). But even under a judicial estoppel theory, an absolute bar on the ADA claim fails to recognize that the inquiries under the Social Security Act are so significantly different from the inquiries under the ADA that the social security proceeding may have only limited relevance to the ADA case.

a. One strong distinction between a social security claim and an ADA claim is the one raised by this Court in its first question to SSA: the manner in which SSA treats a possible reasonable accommodation by the employer that is the defendant in the ADA case, or by other employers. Often in an ADA case, including the present case, one of the plaintiff's contentions is that, even if he could not perform the job as the employer actually has structured it, he could perform the essential functions of the job if the employer made a reasonable accommodation. While the effect of a reasonable accommodation on the claimant's ability to perform his past job is thus often crucial to an ADA case, it is SSA's policy that, when evaluating the claimant's ability to perform his past relevant work at step four of the sequential evaluation process, it will not consider the possibility that the employer might make such a change in the working

environment, if the employer has in fact not done so. Moreover, at step five, when SSA considers whether the claimant could perform other work which exists in significant numbers in the economy, it will look only at the actual jobs in the market, not at changes that employers might make in those jobs to meet their obligations under the ADA.[1]

This position reflects the regulatory definition of "past relevant work," which simply provides that SSA will compare the claimant's "residual functional capacity" with "the physical and mental demands of the kind of work you have done in the past." 20 C.F.R. 404.1560(b), 416.960(b); cf. 20 C.F.R. 404.1573(c), 416.973(c) (special conditions). A reasonable accommodation that the employer did not in fact provide would not fit this definition. SSA does not decide cases on the basis of speculation as whether the employer might be persuaded to adopt some alteration in the work, or might eventually be ordered to do so in a suit under the ADA. Since a large proportion of ADA cases, including this one, are based on a dispute over reasonable accommodations, rather than on whether the plaintiff is able to work even without any accommodation, this factor is one of the most important differences between social security and ADA claims.

b. Another substantive difference between social security and the ADA that can allow for granting disability benefits while still allowing relief under the ADA involves the criteria on which SSA allows benefits in some cases. As we explained *supra*, SSA can award benefits at step three of the sequential evaluation process, without reaching step four, if the claimant's impairment

1. This policy was announced by Associate Commissioner Daniel Skolar in a June 2, 1993 memorandum (attached as addendum, *infra*).

is of a type, and of the severity, that is listed in the regulations as presumptively disabling. Since SSA does not make an inquiry at step three of the claimant's ability to do his past work, his residual functional capacity, or his vocational factors (age, education and work experience), an award of benefits on that basis is not necessarily inconsistent with an ADA claim. Many persons with listed impairments, for example amputations, in fact are able to work quite successfully, even though SSA would find them disabled if they decided not to work and instead sought benefits.

Other claimants are allowed benefits at step five, based upon a finding that the claimant cannot perform other kinds of work that exist in significant numbers in the economy. While SSA does examine at step five the claimant's residual functional capacity, that is, the limitations on his ability to work that are caused by his medical condition, it also must consider the claimant's vocational factors, that is, his age, education, and work experience. Thus, SSA can award benefits to an individual who is able to perform sedentary, light, or even medium work, if his age, education, and lack of transferrable skills from past employment make it unlikely that he could adjust to other work for which he is otherwise qualified. See *Heckler v. Campbell*, 461 U.S. 458 (1983). A finding that the claimant satisfies step five on that basis is of little if any relevance to an ADA claim.

c. Another distinguishing factor is that the social security Title II program has a 9-month trial work period (which need not be consecutive months), during which an individual can continue to receive full benefits while also working. See 42 U.S.C. 422(c), 423(e)(1); 20 C.F.R. 404.1592. This is one situation where the social security program provides, as a work incentive, that a person can simultaneously be considered

disabled for its purposes and thus entitled to benefits, while also actually working. Because of the trial work program, beneficiaries will be less likely to be discouraged from trying to get back into the workforce, since they would not need to fear that, by trying to work, they will lose their reliable means of financial support from the benefits. The ability of a social security claimant to work while maintaining benefits for this 9-month period thus tends to show that a finding of disability need not be a finding that the individual cannot satisfy the work related requirements of the ADA.

2. The claimant's representations to SSA on the factual issues in support of an application for disability benefits, particularly at step four of the sequential evaluation process, where the ability to perform prior work is considered, and SSA's findings on them when awarding benefits, nevertheless can be relevant to a subsequent ADA claim. Both at step four of the social security process and in the ADA claim, factual issues can arise as to the claimant's ability to perform his prior job, despite his medical impairment. The ADA court may take into account the statements and findings made in the social security proceeding as relevant evidence of the claimant's ability to perform the essential functions of his job, as long as those statements and findings specifically address these functions (and they are otherwise admissible). As we explained *supra*, at step four of its five-step sequential evaluation process, SSA denies benefits unless the claimant shows that he is unable to perform his actual past relevant work. See Social Security Ruling 82-61 (reprinted in the addendum). That inquiry bears some similarity to an issue in the ADA case and the court in the ADA case thus can consider that fact

On the other hand, however, there can be specific factual

differences between the two claims that the ADA court can rely upon to still rule in the plaintiff's favor. See, e.g., *D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 4-5 (1st Cir. 1996) (reconciling private disability insurance claim with ADA claim on the facts); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (finding specific factual inconsistencies between SSA and ADA claims). The court should not do as the 3rd Circuit did in *McNemar*, that is, rely simply on the fact that the claimant signed a standard form saying that he is unable to work. Rather, it must look at exactly what the record shows in the social security case, and what SSA found.

3. The Court's second question to SSA concerned the adjustments SSA would make in a claimant's benefits status should he receive reinstatement or back pay under the ADA. If the claimant accepts the reinstatement order and actually returns to work, and the job pays more than $500 a month, that work will presumably constitute substantial gainful activity. See 20 C.F.R. 404.1572, 404.1574. It will thus trigger the 9-month trial work period for Title II beneficiaries that we described *supra* (assuming that the claimant has not already exhausted that trial work period with other jobs), during which the individual can work and still keep the benefits. At the end of the trial work period, the substantial gainful activity would then require termination of the benefits. See 42 U.S.C. 423(d)(1)(A), (e)(1). SSI recipients could also be disqualified because their income exceeds the program's limits. Should the plaintiff for some reason establish to the court in the ADA case that he was medically capable of performing his past job (even without any reasonable accommodation, as we explained *supra*), but the court for some other reason denies reinstatement (for example, because he would have later been laid off), or the plaintiff declines to return to work, even after the court has ordered

reinstatement, and does not otherwise resume working, the court's finding might be used as evidence by SSA in a continuing disability review to determine whether the claimant remains disabled, operating under the same principles concerning the similarities and differences between the programs that we have already outlined. See 42 U.S.C. 423(f). The finding by the ADA court would not, however, be binding on SSA. See 20 C.F.R. 404.1504.

As for the back pay award, since this is a payment for work that the claimant did not actually perform (because he was wrongly denied the opportunity to work), it does not constitute some sort of retroactive substantial gainful activity that would make prior benefit payments erroneous and subject to reimbursement as an overpayment. The regulations define substantial gainful activity by looking not at whether the claimant received income linked to some time period, but rather at whether the claimant actually performed some work. See 20 C.F.R. 404.1572(b) ("work activity that you do for pay or profit"), 404.1574 (a) (1) ("earnings from work you have done"). A large lump-sum back pay award might, however, constitute a financial asset that would prevent a claimant for SSI benefits from meeting the income and resources limitations for those poverty-based benefits, at least until the claimant depleted the funds. See 20 C.F.R. 416.1100. Plaintiff in the present case, however, sought and obtained Title II benefits, not SSI benefits.

CONCLUSION

This Court should vacate the decision of the district court and remand for further proceedings in light of the principles outlined above.

Respectfully submitted,
FRANK W. HUNGER
Assistant Attorney General

ERIC H. HOLDER, JR.
United States Attorney

WILLIAM KANTER
(202) 514-4575
FRANK A. ROSENFELD
(202) 514-0168
Attorneys Appellate Staff, Civil Division, Room 7124
Department of Justice,
Washington D.C. 20530-0001

FEBRUARY 1997

Appendix D

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 1997, I served the foregoing brief for the United States as amicus curiae upon counsel of record by causing copies to be mailed, postage prepaid to:

Karen E. McDonald
Mundy, Holt & Mance, P.C.
718 Beach Street
Flint, Michigan 48502

Robert L. Polk
General Counsel
Robert J. Kniaz
Deputy General Counsel
David R. Keyser
Assistant General Counsel
Washington Metropolitan Area
Transit Authority
600 Fifth Street, N.W.
Washington, D.C. 20001

s/ Frank A. Rosenfeld
FRANK A. ROSENFELD
Attorney